Filed 5/29/19 P. v. Rosales CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ADAN ROSALES, Defendant and Appellant.	B292532 (Los Angeles County Super. Ct. No. BA460768)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. La Forteza, Judge. Affirmed.

Dejan M. Gantar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Adan Rosales appeals from the denial of his motion to suppress evidence. Believing he closely matched the description of an individual suspected of a recent nearby car burglary attempt, police detained Rosales for further investigation. As part of that investigative stop, the officers handcuffed Rosales before patting him down to search for weapons. During the patdown, they found a handgun in Rosales's waistband. Based on the fruit of this search, Rosales was charged with being a felon in possession of a firearm, in violation of Penal Code section 29800, subdivision (a)(1).[1]

Rosales moved to suppress the handgun, arguing the officers did not have reasonable suspicion to conduct an investigative stop or grounds to frisk him. The trial court denied the motion to suppress evidence. We now affirm.

BACKGROUND

The following facts were adduced at the preliminary hearing and the evidentiary hearing on the motion to suppress. On September 2, 2017, Los Angeles Police Department (LAPD) Officers Jaime Gonzalez and Daniela Herrera were on patrol in the LAPD's Hollenbeck Division. The officers were flagged down by an individual who told them someone had attempted to break into his car. The victim told the officers he saw a man opening the driver's side door of the victim's car as the victim was walking toward it. The victim described the burglar as a Hispanic male, who was about five feet six inches tall, weighed 200 hundred pounds, had a mustache, and was wearing a black baseball cap with a red brim, white headphones, a white T-shirt, and black

---

1 All statutory references are to the Penal Code.

pants. The officers wrote down the victim's description and generated a report about the burglary attempt.[2]

Approximately one hour and twenty-five minutes later, about two blocks away from where the attempted burglary took place, the officers saw a Hispanic male—Rosales—who looked to be five feet six inches tall, around 200 hundred pounds, had a mustache, and was wearing a black baseball cap with a red brim, white headphones, and a white T-shirt. Rosales was not, however, wearing black pants—he was wearing blue shorts.[3] In addition to having a mustache, Rosales had facial hair along his jawline.

Believing Rosales might be the burglar, the officers decided to detain him to investigate further. The officers stopped Rosales as he was walking along the street, told him to face away from the officers and toward the wall, and placed him in handcuffs. After handcuffing him, the officers patted Rosales down to search for weapons, and found a handgun in his waistband.

Rosales was charged with a single count of being a felon in possession of a firearm (he was not charged with the attempted automobile burglary). Rosales moved to suppress evidence of the

---

[2] The suspect's height and weight was not included in the narrative page of the written report, but Officer Gonzalez testified the height and weight description was included in the report's face sheet, which was not before the court at the evidentiary hearing.

[3] In the written reports, the officers wrote the suspect was wearing blue pants and Rosales was wearing black shorts. During his testimony, Officer Gonzalez said the reverse. Regardless, it is undisputed Rosales's pants were a different color and length than those of the suspect as described by the victim.

handgun, arguing his detention was illegal because the police did not have reasonable suspicion to stop him. He highlighted that he was wearing different pants than the suspect (both in color and length), had more facial hair than just a mustache, and that the suspect could have easily moved much farther away than two blocks in between the time the police report was made and his detention.[4] The People argued the features in common between the suspect's description and Rosales were substantial enough to support the necessary reasonable suspicion for an investigative stop.

The court denied Rosales's motion to suppress the handgun evidence. It found there was sufficient evidence to support the officers' objective reasoning in detaining Rosales. The court also found the patdown search was justified because the officers stopped Rosales based on a report of a felony car burglary, and thus, for officer safety, were permitted to conduct a cursory patdown search.

The case proceeded to trial. After jury selection was completed and before opening statements, Rosales pled no contest to the single charge against him, including admitting his two prior felonies. His plea agreement provided for a recommendation of 2 years in state prison, but when he failed to appear for his initial sentencing hearing, the court sentenced him instead to 3 years. Rosales timely appealed.

---

[4] Based on a statement in the Probation Officer's report, Rosales also argues he has tattoos, whereas the description of the suspect did not mention any tattoos. As this evidence was not part of the suppression hearing, we do not consider it. (*People v. Dotson* (2009) 179 Cal.App.4th 1045, 1051, fn. 1.)

DISCUSSION

A. Standard of Review

When reviewing a trial court decision on a motion to suppress evidence, we defer to the trial court's factual findings if supported by substantial evidence. (*People v. Evans* (2011) 200 Cal.App.4th 735, 742.) We then apply the law to those facts and make an independent decision as to whether a search or seizure was reasonable under the Fourth Amendment. (*Ibid.*) "We will affirm the trial court's ruling if it is correct on any theory of law applicable to the case, even if for reasons different than those given by this court." (*Ibid.*)

B. Summary of Pertinent Seizure Law

"Our federal and state Constitutions prohibit unreasonable seizures." (*In re Antonio B.* (2008) 166 Cal.App.4th 435, 439 (*Antonio B*).) " 'A seizure occurs whenever a police officer "by means of physical force or show of authority" restrains the liberty of a person to walk away.' " (*People v. Celis* (2004) 33 Cal.4th 667, 673 (*Celis*).) "A seizure can be either an arrest or a detention." (*Antonio B.*, *supra*, 166 Cal.App.4th at pp. 439—440.) Depending on the type of seizure, there is a corresponding level of suspicion required for the seizure to be considered reasonable and thus constitutionally permissible.

"[T]he Fourth Amendment allows police to conduct a brief, investigatory search or seizure, so long as they have a reasonable, articulable suspicion that justifies their actions." (*Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 990.) This reasonable suspicion standard requires officers have " 'a minimal level of objective justification' " for the investigatory seizure. (*Ibid.*; *People v. Williams* (1999) 20 Cal.4th 119, 130 (*Williams I*).)

In particular, there must be " " 'some objective manifestation' that criminal activity is afoot and that the person . . . stopped is engaged in that activity." " (*Antonio B.*, *supra*, 166 Cal.App.4th at p. 440.) "In determining the lawfulness of a temporary detention, courts look at the ' "totality of the circumstances" ' of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing.' " (*People v. Walker* (2012) 210 Cal.App.4th 1372, 1382 (*Walker*).)

An arrest, on the other hand, requires more than reasonable suspicion. "An arrest 'must be supported by an arrest warrant or by probable cause. [Citation.] Probable cause exists when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime.' " (*Antonio B.*, *supra*, 166 Cal.App.4th at p. 440.) Depending on the duration, scope and purpose of an investigative detention, such a stop can become a de facto arrest requiring probable cause. (*Celis*, *supra*, 33 Cal.4th at pp. 674—675.) " '[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least-intrusive means reasonably available under the circumstances.' " (*Antonio B.*, *supra*, 166 Cal.App.4th at p. 440.)

If officers conduct an investigatory detention without reasonable suspicion or an arrest without probable cause, any resulting seizure is unreasonable, and thus unconstitutional, and

whatever evidence the officers retrieve after the unconstitutional seizure must be suppressed. (§ 1538.5, subd. (a)(1)(A).)

C. The Officers Had Reasonable Suspicion to Detain Rosales For Further Investigation

In arguing the officers did not have reasonable suspicion to detain him, Rosales relies primarily on *Walker*, *Williams v. Superior Court* (1985) 168 Cal.App.3d 349 (*Williams II*), and *People v. Thomas* (2018) 29 Cal.App.5th 1107 (*Thomas*). In *Walker*, a crime at a rail station was reported, and the suspects described as two adult black males. (*Walker*, *supra*, 210 Cal.App.4th at pp. 1377—1378.) One suspect was " 'approximately in his 20's, approximately six[-]one, 195, short afro, clean shaven, light complected, appeared unkempt[,] wearing a backpack", and the other was "[b]lack male adult, 30's, approximately five[-]five, 195, short hair[,] unkempt with a body odor[,] wearing a black sweatshirt jacket with a hood and black pants.' " (*Id.* at p. 1378.) One week later, an officer detained someone at the rail station who he thought " 'possibly resembled' " one of the suspects. (*Id.* at pp. 1378—1379.) That individual was 19 years old, five feet ten inches, approximately 180 pounds, had short black hair, was of medium to dark complexion, had a mustache and a slight goatee, was well-groomed, and was wearing a gray sweatshirt, blue jeans, and blue and white shoes. (*Id.* at p. 1379.) Given the significant differences between the defendant and the suspects, the *Walker* court concluded the officer's opinion the defendant resembled one of the suspects was not objectively reasonable. (*Id.* at pp. 1386—1387.)

In *Williams II*, an officer began following a white sedan whose two passengers were acting suspiciously. (*Williams II*, *supra*, 168 Cal.App.3d at p. 353.) As he was following, the officer recalled he had heard two dispatches about two black males in their mid-twenties, one of which had a beard, committing burglaries over the last week. (*Id.* at pp. 353—354.) One of the dispatches had said the suspects were driving "a yellow, newer, larger sedan." (*Id.* at p. 354.) Even though the sedan was white and neither occupant had a beard, the officer thought maybe they were the burglars. (*Ibid.*) The officer then pulled the car over for a traffic violation. (*Ibid.*) The officer interviewed the two passengers, which revealed nothing that connected them to the robberies, patsearched them, which also revealed nothing, and then asked them if he could search their vehicle, all of which exceeded a traffic stop. (*Id.* at p. 356.) The *Williams II* court held that, based on the officer's vague and materially distorted recollection of the robbery suspects, he could not have had reasonable suspicion or any rational basis for comparing them with the individuals he pulled over. (*Id.* at p. 360.)

Lastly, in *Thomas*, officers were notified that a " 'male black adult subject wearing a dark hoody . . . and black pants' " who appeared to have " 'something mental going on' " was harassing customers in a busy retail area. (*Thomas*, *supra*, 29 Cal.App.5th at p. 1110.) Officers got to the area approximately two and a half hours later, and stopped defendant, a man sitting 80 yards away from the retail area and wearing " 'bulky clothing, bulky hooded sweatshirt and bulky pants, as well as a windbreaker jacket . . . .' " (*Ibid.*) The court held the passage of time between the incident and the officers' response, along with vague description given of the suspect, which did not include his

height, weight, or age but rather a general description of dark clothes, was not sufficient to provide the officers with reasonable suspicion to stop the defendant. (*Id.* at pp. 1115—1116.)

The facts here differ from *Walker*, *Williams II*, and *Thomas*. The LAPD officers were looking for a five foot six inch, 200-pound Hispanic male wearing a black cap with a red brim, a white T-shirt, white headphones, and blue pants and sporting a mustache. That description was not generic. (E.g., *People v. Fields* (1984) 159 Cal.App.3d 555, 563—564 [description of " 'tall, thin, black male, about 25 years old, possibly wearing jogging clothes' " sufficiently unique to justify detention]; *People v. Harris* (1975) 15 Cal.3d 384, 387—389 [description of "male Caucasian, dark hair, moustache, about 5 feet 8 inches tall, about 150 pounds, wearing a light cardigan sweater and dark trousers" sufficiently particular to support initial detention].) An hour and a half later, two blocks away from where the officers took the report, they saw a five foot six inch, nearly 200-pound Hispanic male with a mustache wearing a black cap with a red brim, a white T-shirt, and white headphones. The two discrepancies between Rosales and the victim's description of the suspect—pants and facial hair—did not vitiate the many other similarities.[5] Nor do we find compelling Rosales's argument that

---

[5] Further, both discrepancies could have had reasonable explanations. It is unclear how long Rosales's shorts were, and it is possible the witness did not fully see or recall the pants. Although the officers were told the suspect had a mustache, it was not unreasonable for them to stop someone who had a mustache as well as some additional facial hair along the jawline. The reporting citizen, who saw the man from an unspecified

it was unreasonable for the officers to believe the suspect would still be in the area of the attempted burglary. The suspect did not steal the car, and it was reasonable to assume he remained on foot and may not have travelled far.

Unlike the cases on which Rosales relies, the officers here did not stop the defendant based on just race, age, general physical appearance, or a vague description of dark clothing. They did not stop him a week after the alleged crime. Instead, they stopped him based on a similarity in race, height, weight, mustache, and several specific clothing articles, no more than an hour and a half after they took a report that someone of that description had been trying to steal a car in the same area. This was sufficient reasonable suspicion on which to conduct an investigatory stop.

D. Upon Detaining Rosales, the Officers Were Permitted to Conduct a Patdown Search for Weapons

Rosales contends that the officers conducted an illegal patdown search of his person when they detained him. "A limited, protective patsearch for weapons is permissible if the officer has 'reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.' " (*In re H.H.* (2009) 174 Cal.App.4th 653, 657; see generally *Terry v. Ohio* (1968) 392 U.S. 1, 28.)

If officers reasonably believe the suspect they are stopping might possibly be a burglar, it is proper for them to conduct a

---

distance, could have not seen or could have failed to mention the facial hair along the jawline.

patdown search for their own protection, because it is reasonable to believe the burglar might be armed with either weapons or tools for use in burglary that could be used as weapons. (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230; *People v. Myles* (1975) 50 Cal.App.3d 423, 430.)

E. Rosales Did Not Raise Below the Claim His Handcuffing Was a De Facto Arrest Requiring Probable Cause

Rosales additionally argues that when the officers handcuffed him before conducting the patdown search, they converted the investigatory stop into an unlawful de facto arrest for which they lacked probable cause. Rosales's moving papers stated he was stopped without probable cause, but he confined his presentation during the hearing to arguing he was stopped without reasonable suspicion. Because he did not adequately raise or litigate the de facto arrest claim in the trial court, he may not do so now on appeal.

A "defendant[] must specify the precise grounds for a motion to suppress, including pointing out any inadequacies in the prosecution's justifications for a warrantless search or seizure . . . ." (*Williams I*, *supra*, 20 Cal.4th at p. 135.) Once a defendant challenges a search as warrantless, which Rosales did, "[t]he prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification. [Citation.] Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal." (*Id.* at p. 136.) The reason for this rule is " 'an elemental matter of fairness in giving each of the parties an

opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions.' " (*Ibid.*)

Here, only the issue of reasonable suspicion for an investigatory stop was litigated below. While Rosales asserted in his moving papers he was stopped without probable cause, in contrast to the defendant in *Williams I*, his motion cited no cases and discussed no law relating to de facto arrests. He did not mention the officers' handcuffing in his moving papers or at any point in the proceedings. In contrast to *Williams I*, the trial court did not limit defense counsel's argument in any way and defense counsel in fact told the court and the prosecution that Rosales was only challenging his initial detention for an investigatory stop. Indeed, when the prosecutor began to ask questions about the reasons for the patdown process used by the officers (which included the handcuffing), defense counsel objected and the court indicated such testimony was not relevant in light of defendant's challenge being confined to the investigatory stop.

Under these circumstances, Rosales did not provide fair notice of the de facto arrest issue below or the opportunity to present evidence regarding it. (*People v. Oldham* (2000) 81 Cal.App.4th 1, 15.) Accordingly, the record does not contain evidence one way or the other on issues necessary to determine the propriety of handcuffing defendant, such as whether the officers had a reasonable basis for believing Rosales posed a threat or might flee. Having limited his challenge and the evidence presented below to whether there was reasonable suspicion for the investigatory stop, defendant cannot now broaden it on appeal and argue a lack of evidence justifying the decision to handcuff him prior to the patdown search.

In any event, as Rosales concedes, under the doctrine of inevitable discovery, the de facto arrest issue is moot if we find the officers had reasonable suspicion to stop him and justification for a patdown search for weapons. (See *Nix v. Williams* (1984) 467 U.S. 431, 444.) As we conclude the officers did have reasonable suspicion to stop Rosales and were justified in conducting a patdown search for weapons, the handgun would have been found and admissible regardless of the officers' use of handcuffs in the moments before the patdown search.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.